

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

October 18, 1999

REGULATORY AUTH.

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EXECUTIVE SECRETARY

IN RE:

**PETITION FOR ARBITRATION BY
ITC^DELTA COM COMMUNICATIONS,
INC. WITH BELL SOUTH
TELECOMMUNICATIONS, INC.,
PURSUANT TO THE
TELECOMMUNICATIONS ACT OF 1996**

DOCKET NO. 99-00430

**EXCEPTIONS TO REPORT AND INITIAL ORDER
OF PRE-ARBITRATION OFFICER**

ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") hereby files this exception to the Report and Initial Order of Pre-Arbitration Officer. In his *Report and Initial Order*, the Pre-Arbitration Officer ("PAO") found that ITC^DeltaCom had not presented the issues of binding forecasts and the Master Street Address Guide ("MSAG") in its Petition for Arbitration of its interconnection agreement with BellSouth Telecommunications, Inc. ("BellSouth"), and thus found that these issues were excluded from consideration.¹ ITC^DeltaCom respectfully submits that this finding effectively excludes arguments and evidence from consideration of specific open issues set forth in ITC^DeltaCom's Petition for Arbitration and prevents the resolution of key

¹ "The PAO finds that DeltaCom's rewording of Issue 3(m) in the September 13 filing and DeltaCom's proposed questions (a, b, c, and d) under Issue 5 in the Issues Matrix of August 31 are expansions rather than clarifications of these issues as originally presented in the petition, and as such, are rejected." *Report and Initial Order of Pre-Arbitration Officer* at p. 10.

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open issues that were not successfully negotiated between the parties. The Tennessee Regulatory Authority ("TRA") has the duty under the Telecommunications Act of 1996 ("Act") to resolve each and every open issue set forth by ITC^DeltaCom in this arbitration. Therefore, the TRA should reconsider the PAO's finding and find that the issues of binding forecasts and the MSAG are appropriate for arbitration.

ITC^DeltaCom included the issues of binding forecasts and the MSAG in its Petition for Arbitration. The record is clear that ITC^DeltaCom expressly incorporated a proposed interconnection agreement and summary issues matrix into its Petition for Arbitration. (See paragraphs 6 and 7). That Petition was filed over four months ago on June 11, 1999. Exhibit A to the Petition, the proposed interconnection agreement, clearly covers the issues of binding forecasts and the MSAG, and Exhibit B, the summary matrix of issues, also clearly identifies these same issues, even setting out the parties' respective positions.

The Federal Rules of Civil Procedure provide guidance on the issue of attachments to pleadings. Rule 10 states that "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." Fed. R. Civ. Pro. R. 10(c) (1999). Rule 10.03 of the Tennessee Rules of Civil Procedure embodies the principle of the federal rule, albeit in more specific and particularized language. Rule 10.03 provides that "[w]henever a claim or defense is founded upon a written instrument other than a policy of insurance, a copy of such instrument or the pertinent part thereof shall be attached to the pleading as an exhibit . . . Every exhibit so attached . . . shall be a part of the pleading for all purposes." Tenn. Civ. Proc. Rule 10.03 (1998). Louisiana, Florida, and North Carolina also follow the federal rule in providing that any written instrument attached to a pleading is a part thereof for all purposes. See La. C.C.P. art 853 ("A

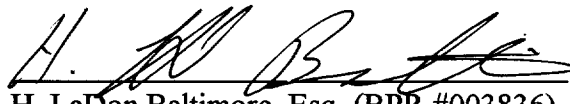
copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.”); Fla. R. Civ. P. 1.130 (“Any exhibit attached to a pleading shall be considered a part thereof for all purposes.”); N.C. Gen. Stat. § 1A-1, Rule 10(c) (“A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.”). Therefore, Exhibits A and B should be considered as part of the Petition. To preclude these issues because ITC^DeltaCom addressed them primarily in an exhibit is a hypertechnical distinction without a difference. Neither the Act nor Tennessee law prohibits the use of exhibits to “set forth” issues for arbitration.

Furthermore, the binding forecast issue and the MSAG issue should not be excluded from consideration on the basis that BellSouth has not had a reasonable opportunity to respond to these issues. The facts do not support such a rationale. It is undisputed that these issues were the subject of voluntary negotiation between the parties and were included in the June 11, 1999, filing. Moreover, the binding forecast issue has been addressed in BellSouth’s and in ITC^DeltaCom’s prefiled testimony in other states. See, e.g., Direct Testimony of ITC^DeltaCom witness Thomas Hyde at pp. 22-23, LPSC Docket No. U-24206; Rebuttal Testimony of BellSouth witness Alphonso Varner at pp. 3-4, LPSC Docket No. U-24206; Direct Testimony of ITC^DeltaCom witness Thomas Hyde at pp. 25-26, FPSC Docket No. 990750-TP; Rebuttal Testimony of BellSouth witness Alphonso Varner at pp. 16-17, FPSC Docket No. 990750-TP. Similarly, the MSAG issue has been addressed in ITC^DeltaCom’s prefiled testimony in other states. See, e.g., Direct Testimony of ITC^DeltaCom witness Michael Thomas at p. 6, LPSC Docket No. U-24206; Id., FPSC Docket No. 990750-TP). Therefore, it is clear

that BellSouth responded to ITC^DeltaCom's arguments in other states and will undoubtedly do so again in this State.

Additionally, with respect to the MSAG, the TRA should not ignore the public safety and welfare impact of excluding that issue from consideration. The sole purpose of the MSAG is to allow ITC^DeltaCom to route quickly and accurately 911 and E911 calls. Without daily updates of the MSAG, Tennessee consumers are put at a substantial risk. BellSouth's actions in this regard are reckless and must be rejected.

ITC^DeltaCom respectfully requests that the TRA reconsider the PAO's finding regarding the issues of binding forecasts and the MSAG and permit ITC^DeltaCom to present relevant arguments and evidence at the hearing in this matter.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 18th day of October, 1999, a true and correct copy of the foregoing was served by hand delivery, facsimile delivery, overnight delivery or U. S. Mail, first class postage prepaid, to the following: Guy Hicks, Esq., BellSouth Telecommunications, Inc., 333 Commerce Street, Suite 2101, Nashville, TN 37201-3300


H. LaDon Baltimore